Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EMMA K. ALEXANDER,

Petitioner,

vs.

DONALD B. RICE,
SECRETARY OF THE AIR FORCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Emma K. Alexander
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QUESTIONS PRESENTED FOR REVIEW

1. Does the violation of established Air Force policy, the manipulation of the promotion process, and the destruction of pertinent documents relating to the issue support the dismissal of my complaint of age and race discrimination?

2. Does the trial testimony by the Respondent, that was in direct contrast to their earlier testimony, supersede that given in their affidavits, depositions and during the Hearing?

3. Does the Petitioner's ranking on a promotion roster, that is directly influenced by input from the Respondent (Erwin Wybenga, selecting official), who was deemed less than credible by the Hearing Examiner, objectively show that Petitioner ranked fifteen out of sixteen candidates?

4. Do the above mentioned irregularities by the Respondent, that have been substantiated by the Hearing Examiner and EEO officials, particularly the manipulated interview scores, support the contention that the Petitioner ranked fifth out of six interviewed candidates and therefore was not the best qualified candidate?

5. Does the substantiation of detected manipulation by the Respondent, whether or not it availed the Petitioner, conclude that other undetected manipulation did not occur that did adversely affect the Petitioner?

6. Does Petitioner's training and experience in the Joint Uniform Military Pay System (JUMPS), that began before this computerized pay system was officially established and before either of the selectees worked for the Air Force

and that the panelist were not allowed to review, have any relevance to Petitioner's qualifications for promotion to GS-501-11?

7. Should eleven years of specialized training and experience in the Branch where the vacancy existed be discounted based on a manipulated interview score?

8. Do harsh remarks that the selecting official admits making when he was Petitioner's supervisor lead one to believe that other remarks were not made?

9. Does the Respondent's necessity to manipulate the promotion process lend credence to a legitimate reason for my non-selection?

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1992

Emma K. Alexander,

Petitioner,

vs.

Donald B. Rice,

Secretary of the Air Force,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Emma K. Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit dismissing my claim of age and race discrimination when records show that Petitioner was clearly the best qualified candidate for promotion to GS-501 11 in the Branch where Petitioner had worked since its inception.

OPINIONS BELOW

The Order and Judgment of the Court of Appeals is reported as Emma K. Alexander v. Donald B. Rice, Secretary of the Air Force, 92-1010 (D.C. No. 89-C-841) (10th Cir. 1992) and appears in Appendix A of this Petition. The unpublished written opinion of the

District Court for the District of Colorado appears in Appendix B of this Petition. The unpublished recommended pretrial order of the Magistrate, adopted by the District Court for the District of Colorado, appears in Appendix C.

JURISDICTION

The Court of Appeals' Order and Judgment in this matter was filed on June 26, 1992. A timely Petition For Rehearing was filed on July 2, 1992. The Court of Appeals' denial of the Petition For Rehearing was issued on July 22, 1992 and is set forth in Appendix D. The Court's jurisdiction is invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 e, et seq., and under the Age Discrimination in Employment Act of 1967, as amended, 29

U.S.C. Sec. 621, et seq., and 42 U.S.C., Sec. 1343 (3) and (4) k.

STATEMENT OF THE CASE

The United States District Court, District of Colorado, had jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 e, et seq., and under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621, et seq., and 42 U.S.C., Sec. 1343 (3) and (4) k.

The Petitioner is a black 56 year old, GS-501-9 Financial System Specialist in the Systems Test Branch, Evaluation and Analysis Division, Directorate of Military Pay Operations, Air Force Accounting and Finance Center, Denver, Colorado (AFAFC, the Agency).

In June, 1984, the Testing Branch consisted of ten (10) civilian employees, the supervisor, Erwin Wybenga, GS-13, (selecting official), two (2) GS-12 accountants, a GS-5 control clerk, and six (6) GS-9 Financial Systems Specialists (testers). The Testing Branch tested two specific areas of work called by the acronyms JUMPS (Joint Uniform Military Pay System) and ARPAS (Air Reserve Pay and Allowance System).

The Petitioner was one of the six testers; the other five were caucasian. Prior to June, 1984, GS-9 was the highest attainable grade in the 501 series.

In June, 1984, a GS-501-11 position was created in the ARPAS area of the Testing Branch. (March 2, 1990, Michael J. Norton, U.S. Attorney, Paula M. Ray, Assistant U.S. Attorney.)

On June 20, 1984, interviews were held, Mary Ann Putman was selected and assigned to the ARPAS area of work.

On June 25, 1984, the Petitioner wrote an inquiry to the Personnel Office asking why Petitioner had not been considered for this position since she had been referred for promotion to a GS-11 Financial System Specialist position in the Testing Branch in the Directorate of Retired Pay just one month earlier (May, 1984).

The response was that Petitioner rated sixteenth on the promotion roster.

On July 17, 1984, Petitioner filed an EEO complaint of age and race discrimination. The selectee for this position, Mary Ann Putman, was a 31 year old caucasian employee with approximately 3 years testing experience and no ARPAS experience, the job for which she was

selected. (Hearing Transcript, May 19, 1986, p.86 and 89). Evidence and testimony produced at the hearing shows that Shirley Geist expressed considerable displeasure to her co-workers and to the selecting official regarding her non-selection. (Recommended Decision, Bernard D. Steinberg, September 30, 1986, p.14.

In August, 1984, a GS-501-11 position was created in the JUMPS area of the Testing Branch. Again the selectee was a caucasian, 48 years old, with about three years testing experience and no experience in JUMPS, the job for which she was selected. (Hearing transcript, May 19, 1986, page 106). This selectee, Shirley Geist, had worked solely in ARPAS and the June, 1984, selectee, Mary Ann Putman, had worked solely in JUMPS. The Hearing Examiner had no difficulty

finding that the selecting official manipulated the factors, ratings and rankings to enable him to select Shirley Geist. (Recommended Decisions, Bernard D. Steinberg, September 30, 1986, p.15).

On October 22, 1984, Petitioner filed another age and race discrimination complaint. Records clearly show that the Petitioner had more training and experience and therefore, objectively, was the best qualified candidate for this promotion.

On May 19, 1986, a hearing was conducted by Examiner, Bernard D. Steinberg.

On September 30, 1986, Hearing Examiner, Bernard D. Steinberg, recommended no discrimination.

On August 8, 1988, EEO Director, Stella G. Guerra, decided no discrimination.

On August 29, 1988, Petitioner appealed decision of no discrimination.

On November 9, 1988, Director, Office of Review and Appeals, Delores L. Rozzi, upheld decision of no discrimination.

On December 7, 1988, Petitioner requested re-opening on complaint.

On April 17, 1989, Request to Re-Open Complaint was denied.

On May 15, 1989, Petitioner filed complaint in the U.S. District Court for the District of Colorado.

On November 12 and 13, 1991, trial was held in the U.S. District Court for the District of Colorado.

On November 13, 1991, the U.S. District Court for the District of Colorado ruled there was no age or race discrimination and ruled to dismiss the case. (Appendix B).

On February 2, 1992, Petitioner appealed the decision of dismissal to the U.S. Court of Appeals for the Tenth Circuit.

On June 26, 1992, the U.S. Court of Appeals affirmed the decision of dismissal.

On July 2, 1992, Petitioner submitted a Petition For Rehearing.

On July 22, 1992, the Petition For Rehearing was denied.

The U.S. Court of Appeals was somehow under the impression that the Petitioner's claim involved a termination; it did not.

The Court was somehow under the impression that the witness, Olga Humphrey, on whose testimony the Court relied so heavily, was retired, had no ax to grind and therefore had no interest in the outcome of the case. This witness is

currently employed at the Air Force Accounting and Finance Center. After these proceedings began was suddenly, without provocation or prior knowledge, removed from her office, lost her position, title and all management responsibilities. This witness gave testimony during the trial that, in an earlier affidavit, she stated she had no knowledge.

The Court felt that Petitioner had not filed a timely complaint. This is not true. (Hearing Transcript, Hearing Examiner, Bernard D. Steinberg, May 19, 1986, p.164, ll.8-16). The Court was also under the impression that the Petitioner had never received letters of commendation.

The Court was concerned that the Petitioner had not been promoted in 16 years without regard for the

irregularities in the present selection process which has been a regular practice at the Agency. Petitioner was working in the Testing Branch before either of the selectees or the selecting official were employed at the Air Force Accounting and Finance Center. Before JUMPS was organized, the Petitioner was a member of a Parallel Test Team designed solely to detect and eliminate as many problems as possible before this sophisticated computerized system was implemented. After JUMPS was officially organized, the Petitioner was assigned to the Testing Branch where she worked until retirement.

The Court chose to accept and believe untruths, half truths and denials presented by the Respondent without regard for prior testimony. In prior testimony, the selecting official admitted making harsh remarks to

Petitioner, but the District Court chose not to believe one in particular, "that the selecting official told Petitioner that he was prejudiced" during a trivial incident that happened in the office involving the Petitioner and another caucasian employee.

The Respondent's witness, Shirley Geist, who worked in the Testing Branch every day, testified in her affidavit (Investigative File, p.28, ll.2-3, (May 29, 1985)) and at the trial that she never heard the selecting official make harsh statements to the Petitioner that the selecting official admits he made. (Investigative File, p.19, ll.6-7, l.13, ll.16-17 and ll.19-20; Hearing Transcript, May 19, 1986, p.135, ll.1-6

The Court accepted and apparently believed trial testimony by the Respondent that was in direct contrast to

their earlier testimony in affidavits, depositions and at the Hearing.

The Petitioner was aware of manipulation by the Respondent in the courtroom, but Petitioner did not know how to counteract the way questions were posed so as to require a yes or no response. It resulted in the exclusion of testimony from a witness who was present but not called. Attorney Tate, who accepted Petitioner's case seven years after the fact, was unaware of earlier testimony and exhibits and therefore took no action.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for these reasons: Petitioner was the only black tester in the Testing Branch and was treated different from other testers. Petitioner was overwhelmingly more qualified for promotion to GS-501-11 than

either of the selectees. The Respondent violated rules of the Merit Promotion Program and manipulated the promotion process. The fact that detected manipulation did not avail the Petitioner does not conclude that undetected manipulation did not occur and have an adverse effect on the Petitioner in this promotion process. Trial testimony by the Respondent differed from his earlier testimony, testimony given during the time in which the Respondent was determined by the Hearing Examiner to be less than credible. Also some trial testimony was misinterpreted by the District Court.

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII, Sec.,

e.g. 110 Cong. Rec. 13088 (1964) (Remarks of Senator Humphrey).

Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer treats some people less favorable than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment.

Petitioner was denied administrative leave authorized for all employees.

Petitioner's Personnel File was not updated even though supporting documentation was provided.

Respondent refused to assist in correcting Petitioner's leave record.

Petitioner was often not advised of meetings that concerned all employees.

Petitioner was denied approved attendance at our National PDI.

Petitioner's 35-year plaque was not presented in the customary manner; it was simply found one morning on Petitioner's desk about a month before it was due.

Petitioner was routinely assigned the same work as the newly promoted June, 1984, selectee, both before and after her promotion.

Petitioner was required to do work for the newly promoted August, 1984, selectee who had no JUMPS experience.

Petitioner was consistently assigned more work than other testers.

Petitioner was occasionally assigned work that had become too involved or too difficult for other testers.

Respondent disapproved a previously approved and most deserving luncheon for one of the older testers on the day of

the luncheon when Respondent learned that the Petitioner had planned it and made all arrangements.

Petitioner's Leave and Earnings statement was often received already opened.

Respondent refused to relocate Petitioner's desk, although Petitioner advised Respondent that each morning Petitioner's desk was covered with particles that had fallen from the ceiling.

Respondent refused to relocate Petitioner's seat from a 6'x 4' cubicle that also housed a piece of computer equipment that produced heat and a constant hum, even though there were two empty work areas. Temperatures reached as high as 80 degrees Fahrenheit in my work station.

Respondent spoke harshly to Petitioner, making remarks such as: "I wouldn't help you if I knew what the circumstances were"; "You will get credit for one hour even if you work all day"; Nobody makes me do anything"; "Because I said so"; You work for me"; You will not attend"; I am prejudiced and I circle who I chose". Even when the remarks were not adverse, the tone was still harsh.

Cuddy v. Carmen, 694 F.2d 853, 857, 30 FEP Cases 600, 603 (D.C. Cir. 1982). In order to prevail you must show by a preponderance of evidence that age was "a determining factor" in the non-selection decision or that age "made a difference".

Petitioner was eligible for retirement in 1982.

Respondent periodically asked Petitioner when did she plan to retire.

Petitioner was not given training on new equipment as was other testers.

The Respondent made no mention to Petitioner's co-workers of her thirty-five year service; he gave recognition to marriages, new cars, vacations, and non-related work accomplishments.

One of the older workers, Lee Groves, received no recognition for the work she did that had to be done by two, occasionally three, people after she retired.

An approved and well deserved luncheon for one of the older workers was disapproved by the Respondent on the morning of the luncheon.

Petitioner was ignored by the Respondent unless communication was unavoidable or absolutely necessary.

The Petitioner was treated with such disdain that she, with two other testers,

Rose Shilling and Marjorie Hewlett, reported it to the Division Chief, Rick Kovert, however, Petitioner heard nothing more about it.

In early May, 1984, when it was apparent that something peculiar was going on, Petitioner asked Mr. John Scott, Deputy Director of the Agency, to check into the irregularities in the Testing Branch. He delegated the authority to Col. Summerhill who retired shortly thereafter and again Petitioner heard nothing more.

Mohammed v. Calloway, 698 F.2d 395 (10th Cir. 1983) states (1) that the evidence relevant to showing pretext include the employer's prior treatment of the plaintiff; (2) the employer's general policy and practice with respect to minority employment, particularly statistics reflecting a general pattern

and practice of discrimination; (3) disturbing procedural irregularities; (4) the use of subjective criteria, especially when used to evaluate candidates that are not objectively equally qualified. McDonnell Douglas v. Green, 411 U.S. at 804, 93 S. Ct. at 1825. The employers prior treatment of petitioners. Id. at 804-805, 93 S. Ct. at 1822-26. The employer's general policy and practice with respect to minority employment, particularly statistics reflecting a general pattern and practice of discrimination.

There has never been another black person hired in the Testing Branch although all positions have been vacant at one time or another.

Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir. 1980) refers to the use of subjective criteria, especially when used

to evaluate candidates that are not objectively equally qualified.

Selection was made without consideration for the candidate's training or experience.

Respondent made a promotion selection on a manipulated interview score.

Promotion certificate does not show that August, 1984, selectee was called or interviewed; it is simply annotated "selectee".

Promotion qualifications was for 12 months as GS-9. Promotion certificate contained a GS-7 who was not identified or his entry on the promotion certificate justified.

Interview scores were discussed and changed.

Ranking factors used in the June, 1984, selection process were not used in the August, 1984, selection process.

Williams v. Boorstin, 663 F.2d 109, 117 (D.C. Cir. 1980).

Disturbing procedural irregularities. Employees were selected for positions for which they had no training. See the Hearing Transcript, May 19, 1986, in which the June, 1984, selectee states she had no ARPAS (Hearing Transcript, May 19, 1986, p.86 and 89) experience and August, 1984, selectee states she had no testing experience. (Hearing Transcript, May 19, 1986, p.106, 11.8-10) Also see the Hearing Transcript where the selecting official states he doesn't know why he assigned the June, 1984, selectee to ARPAS (Hearing Transcript, May 19, 1986, p.141, 11.23-24).

Both selectees, each with approximately 3 years of testing experience, were candidates on the June, 1984, promotion certificate. The August, 1984, selectee, Shirley Geist, who was the sole ARPAS tester (Investigative File, p.27) became angry (Hearing Transcript, May 19, 1986, p.152, ll.11-13) refused to do her work and refused to train June, 1984, selectee, Mary Ann Putman, who had no ARPAS experience (Hearing Transcript, May 19, 1986, p.86 and p.89). The Respondent then created a GS-11 position for the JUMPS area of work. Although Petitioner had more testing experience and training than anyone in her Branch or anyone in the entire installation, the promotion process was manipulated and Shirley Geist was selected. The extent to which manipulation occurred was not determined.

Detected manipulation does not conclude that undetected manipulation did not occur and adversely affect the Petitioner.

Air Force Regulation 40-335 (C1) 6 January 1989, 12 November 1980.

Air Force promotion policy is based on strict conformance with merit principles specified in Federal Personnel Manual chapter 335, Section A(1).

Violations by the Respondent are these:

Favoritism was present in the selection process (Section A, 2(d) as substantiated by the Hearing Examiner, September 30, 1986, and EEO officials, November 9, 1988;

Panelist were not allowed to review the candidates career brief (Section C, 23(b)(2)(a) (specifically on p.8.1, ll. 11-19);

Promotion register did not contain all required data (Section C, 25(a) (specifically on p.8.1, ll.7-11);

The career brief was not used to make a comparative evaluation and objective selection decision (Section C, 28) (specifically on p.9, ll.1-9);

Management education and training was not used in the selection process (Section C, 28(b) (specifically on p.9, ll.8-11;

Respondent did not retain records involving the promotion (Section F, 38(c));

One candidate, the August, 1984, selectee, was interviewed twice for the same job and asked the same interview questions within a ninety-day period (Center Supplement 1, Air Force Regulation 40-335, 30 November 1983, [29. ll.2-4]);

Regulations provide for selection without an interview; Respondent made the interview the primary factor (Center Supplement 1, Air Force Regulation 40-335, 30 November 1983, [29. 11.4-6);

Awards were erroneously given for a CPAS rating (Handout #4 CPAS Questions and Answers, 1.10);

Award points were given in excess of the allowable number (Center Supplement 1, Air Force Regulation 40-335, 30 November 1983);

Award point recency was given for five years. (Hearing Transcript, May 19, 1986, p.147, 1.21; Center Supplement 1, Section C, 23(b)(2)(c).

Hicks v. Gates Rubber Co., 833 R.2d 1406, 1419 (10th Cir. 1987); Capaci v. Katz and Besthoff Inc., 711 F.2d 647, 661 n. 7 (5th Cir. 1983). Pitre v. Western Elec. Co., 843 F.2d 1262, 1272, 1273 n. 6

(10th Cir. 1988) states promoting a member of a protected class does not prove that a non-promoted member of the class was not discriminated against.

Records show that Petitioner had training and experience over and above that required to perform the job of testing.

Testimony shows that the August, 1984, selectee had no JUMPS testing experience, the job for which she was selected. (Hearing Transcript, May 19, 1986, p. 106, ll.8-10).

Records relative to the case were selectively provided by the Respondent.

The examiner had no difficulty finding that the selecting official manipulated the factors. (Finding and Recommended Decision, Bernard D. Steinberg, September 30, 1986, p.15).

Petitioner was a member of the Parallel Test Team before JUMPS was organized and Petitioner worked in the Testing Branch since its inception, before either of the selectees began working for the Air Force.

Pitre v. Western Elec. Co., 843 F.2d 1262, 1272, 1273 n. 6 (10th Cir. 1988) states that an employer's reliance on subjective factors, where consistent with other specific discriminatory incidents and the inconsistent application of a policy of the employer, can be found to be additional evidence of discrimination.

Awards were given to the June, 1984, selectee several months before the GS-501-11 position was created. (Hearing Transcript, May 19, 1986, p.96, l.9 and 10).

The June, 1984, selectee was assigned to ARPAS one month before being

selected for the ARPAS GS-501-11 position.

Respondent doesn't know why he assigned the June, 1984, selectee, Mary Ann Putman, to the ARPAS area of work.

Regulations require an annual appraisal; the Petitioner received two in 1984. In an effort to conceal this information, the Respondent provided the "Supervisor's Record of the Employee" with this information scratched off.

Promotion roster provided by the Respondent shows Petitioner's CPAS as 105. Petitioner's Placement Data Brief provided by the Respondent showed no CPAS prior to September, 1984; prior ratings had been removed.

The Respondent changed interview criteria that the other two panelist knew nothing about.

Adams v. Gaudet, 515 F. Supp. 1086 (1981). In employment discrimination actions wherein evidence shows that, judged by governing standards for the job in question, the plaintiff was clearly more qualified than the person who received the job, an extremely heavy burden is imposed upon the defendant who attempts to justify his actions with proof that his decision was based on potentially proper subjective considerations. at p.1099.

Evidence that an employer has misjudged the qualifications of candidates is probative of whether the employer's reasons are pretest for discrimination. Moreover, the use of subjective factors supports an inference of pretext when an employer justifies rejection of a minority candidate on the basis of such factors, even though the

minority is objectively better qualified than the non-minority chosen. at p.401.

Petitioner's non-selection was based solely on interview scores manipulated by the Respondent as substantiated by the Hearing Examiner and EEO officials.

Petitioner's records show unquestionably that her training and experience that began before JUMPS was officially established far exceeds that of the selectee.

Petitioner has worked in the Testing Branch since its inception experiencing all facets of the testing process.

Huey v. Dept. of Health and Human Services, Agency No. 05-7-233-78, Appeal No. 01831403. Huey allowed the Hearing Officer to draw an adverse inference where records are destroyed.

Records were destroyed by the Respondent with the knowledge that an EEO complaint had been filed.

Other records relative to the issue were effaced, reconstructed with omissions or were simply not provided.

Testimony throughout these proceedings have been flawed with contradictions, mis-statements, half-truths and has been proffered with the unavailability of documents.

The entire process is completely within the control of the Respondent and the reason given for Petitioner's non-selection is pretextual. The Respondent offers as his legitimate non-discriminating reason the fact that the Petitioner did not make the top 15 on the first interview and that the Petitioner's performance before the selection panel

was insufficient to merit a promotion on the second occasion.

The Petitioner contends that these proffered explanations are, in fact, subterfuge for unlawful discrimination. The Petitioner contends that the process by which both selections were made was so tainted with irregularities as to delete any possibility of an impartial judgment being reached. The actions taken by the Respondent were designed to, and in fact did, deprive the Petitioner of the opportunity to be promoted to GS-501-11 in areas for which she was fully qualified.

This Court should grant certiorari here to determine that Petitioner should be promoted to GS-501-11 based on her training and experience which is far and above the requirements and which

unquestionably exceeds that of the selectee.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated: 5 November 1992

Respectfully submitted,

Emma K. Alexander

Emma K. Alexander

FILED
JUN 26 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

EMMA K. ALEXANDER, Plaintiff-Appellant,	)	
v.	)	No. 92-1010
DONALD B. RICE, current Secretary of the Air Force, Defendant-Appellee.	)	(D.C. No. 89-C-841) (D. Colo.)

ORDER AND JUDGMENT*

Before MOORE, BARRETT, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Emma K. Alexander appeals from a judgment dismissing her complaint for race discrimination under 42 U.S.C. § 2000e (Title VII), and age discrimination under 29 U.S.C. §§ 621-634 (the Age Discrimination in Employment Act, or ADEA). She contends that the evidence does not support the district court's findings, and that the court misapplied the law. We affirm.

Plaintiff, an African-American female who was born on December 7, 1927, was employed by the United States Air Force as a Financial Systems Specialist at grade GS-9. In June 1984, a GS-11 position became available. Plaintiff

applied, but a younger white female was hired instead. Another GS-11 position became available in August 1984. Plaintiff applied again, and a forty-eight year old while female was hired instead. Plaintiff was fifty-six years old at the time.

Plaintiff filed race and age discrimination charges with the Equal Employment Opportunity Commission (EEOC), then commenced the present action. Only the August 1984 promotion decision is at issue, however, because Plaintiff failed to file a timely charge with respect to the first promotion decision. Following a trial to the court, the district court dismissed both claims of discrimination.

To establish a case of intentional racial discrimination under Title VII, a plaintiff must show that she is a member of a racial minority, that she applied

and was qualified for an available position, that she was rejected despite those qualifications, and that the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.1 Drake v. City of Fort Collins, 927 F.2d 1156, 1159 (10th Cir. 1991). Proof of a prima facie case creates a presumption of discrimination. Id. at 1160.

Once the plaintiff has established a prima facie case, the burden of production shifts to the defendant to rebut the presumption of discrimination by disputing the plaintiff's facts or articulating a nondiscriminatory reason for the disparate treatment. Id. The burden then shifts back to the plaintiff

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1 In this case, the fourth element could be established by showing that another candidate who was not a member of a protected class was hired.

who must prove that the defendant's stated reason was a pretext for discrimination, i.e., that the proffered reason was not the true reason for the decision. Id. The plaintiff may meet this burden directly by showing that racial discrimination was the true motivation, or indirectly by showing that the proffered reason is not believable. Id.

The district court concluded that Plaintiff has established a prima facie case of racial discrimination. Defendant does not challenge the conclusion. The court further concluded that the Defendant had articulated a legitimate, nondiscriminatory reason for not promoting Plaintiff: she was not the most qualified candidate.

Plaintiff attempted to prove that racial discrimination was the true

motivation for her nonpromotion by offering evidence that her supervisor stated he was prejudiced on the basis of race. The court rejected this evidence because it was contradicted by testimony that the supervisor was not prejudiced. The court was particularly impressed by Olga Humphrey's testimony concerning the supervisor's lack of prejudice, noting that Humphrey was retired and therefore had no interest in the outcome of the case.

Finally the court concluded that Plaintiff failed to prove that Defendant's proffered reason for not promoting her was pretextual. It found that Plaintiff was rated fifth out of six candidates for the position, that she did not have any letters of commendation or appreciation or awards for outstanding service prior to this opening, that she

had not been promoted for sixteen years, and that her grades on annual reviews were all average. The court found that while Plaintiff was a competent employee, she was not as qualified as the person selected for the opening.

Plaintiff argues that the district court erroneously relied on Olga Humphrey s testimony because Humphrey is not retired and "is just as afraid of retaliation [sic] as other Air Force employees." Appellant's Brief, Attachment "A." She also argues that she was more qualified than the woman selected for the position.

Findings of fact in an action tried to the court "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). If an appellant intends to argue on appeal that a finding or conclusion is unsupported by or contrary

to the evidence, he or she must include in the record a transcript of all evidence relevant to the finding. Fed. R. App. P. 10(b)(2). Plaintiff did not provide this court with a transcript of the testimony before the district court. We therefore must accept the district court's factual findings that Plaintiff's supervisor was not prejudiced and that Plaintiff was not promoted because she was not as qualified as the woman selected for the position. See Trujillo v. Grand Junction Regional Ctr., 928 F.2d 973, 976 (10th Cir. 1991). These findings support the district court's conclusion that Plaintiff failed to prove her racial discrimination claim.

The district court also concluded that Plaintiff did not establish a prima facie case of age discrimination because the person selected for the opening was

forty-eight years old and Plaintiff was fifty-six years old at the time. Plaintiff argues that promoting a member of a protected class was not discriminated against, city Pitre v. Western Elec. Co., 843 F.2d 1262, 1273 n.6 (10th Cir. 1988).

Age discrimination claims are subject to the same disparate treatment analysis as Title VII claims. MacDonald v. Eastern Wyo. Mental Health Ctr., 941 F2d 1115, 1119 (10th Cir. 1991). After a prima facie case of age discrimination is established, the plaintiff still has the ultimate burden of proving that the defendant's proffered reason for the employment decision was pretextual. Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990). Thus, even if Plaintiff has established a prima facie case of age discrimination, her

failure to prove that Defendant's proffered reason for hiring another candidate was pretextual defeats her age discrimination claim as well. We therefore need not resolve whether she established a prima facie case of age discrimination. See id. at 430 (court need not resolve whether the plaintiff established prima facie case because he failed to present evidence showing reason for termination was pretextual).2

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

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2 Plaintiff's request to present new testimony and facts that were not brought out during trial is denied. This court reviews the evidence presented to the district court; it does not take additional evidence.

The mandate shall issue forthwith.

Entered for the Court

James E. Barrett
Senior Circuit Judge

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 89-C-841

EMMA K. ALEXANDER,

Plaintiff,

vs.

JAMES F. MCGOVERN, Acting Secretary
EDWARD C. ALDRIDGE, JR., Secretary
Department of Air Force, Agency,

Defendants

REPORTER'S TRANSCRIPT OF RULINGS BY THE COURT

Proceedings held before the Honorable Jim R. Carrigan, United States District Judge for the District of Colorado, on the 13th day of November, 1991, at the hour of 2:25 p.m., in the Courtroom C-200, United States Courthouse, 1929 Stout Street, Denver, Colorado.

APPEARANCES:

TRIMBLE, TATE & NULAN, P.C.
By:

PENFIELD W. TATE, II, Esq.
1600 Lincoln, Suite 2802
Denver, Colorado 80264-2801

For the Plaintiff.

PAULA M. RAY, Esq.
Assistant U.S. Attorney
633 - 17th Street, Suite 1600
Denver, Colorado 80202

And

W. JON FABER, Esq.
1900 Half Street S.W.
Room 5142
Washington, D.C. 20324-1000

For the Defendants.

COURT REPORTER: Beverlee Bauer Hedrick
1029 East 8th Avenue
Denver, Colorado 80218

(Proceedings recorded by mechanical stenography, transcript produced by notereading.)

(At the conclusion of argument by counsel, the following proceedings were had:)

THE COURT: I find that the Plaintiff has met her burden of proof on

the discrimination case as to the following elements of the age discrimination:

One, the proof is adequate that she, the plaintiff, was within the protected age group. Number two, that she was doing satisfactory work. Number three, that despite her qualifications she wasn't selected for promotion.

I find, however, that there has not been adequate proof that somebody outside the protected age group received the promotion and it appears to me that on the basis of the statute itself the other element is not met because the lady who was appointed, Miss Geist, was 48 when appointed and the plaintiff was 56, and even if you can go beyond that into a situation where both parties involved are over the age of 40, nevertheless the difference here I don't think is

substantial enough to be significant in the sense that there has to be proof by the plaintiff that age is the factor that makes the difference, makes a difference between promotion and non-promotion in the sense that but for the factor of age the employee plaintiff would not have been adversely affected.

I want to make it clear what I am ruling here. Even if the regulation does provide and the Court opposed the regulation, raising that age discrimination in employment cases applies where both the parties are over 40 and thus both are in the protected age group.

It is my ruling that I don't think the plaintiff has met its burden of proof on the fourth factor anyway because I am simply not persuaded in this case from hearing the evidence, from listening to

the testimony, I am not persuaded that the supervisor Mr. Wybenga stated that he was prejudiced. That was a racial sense if he did, not the age sense.

I don't think that he did. I don't think anybody would make such a statement to a Black woman so it is the Court's holding that the testimony of Olga Humphrey who is older than both the women involved as candidates for this job, the plaintiff and Miss Geist -- she is also a Black woman -- Ms. Humphrey testified several times and once in direct response to my questions that all the time she was there and knew Mr. Wybenga he did not in any way indicate any attitude or statement or feeling of prejudice or bias on the basis of race or age to anybody.

I think there has been a failure to prove, to find a prima facie case even by the plaintiff even though it had been

proved I am persuaded by this stage of the case there is somewhere a reasonable business explanation for what was done in this case.

I find that the plaintiff has not proved that those forces are pretextual. I conclude that the motion for a directed verdict as to age discrimination employment claim is granted. Now I would like to hear the argument on race discrimination.

* * * * * * *

(Argument by counsel not herein transcribed at direction of ordering counsel.)

* * * * * * *

THE COURT: Thank you very much, Mr. Tate, and having reviewed the exhibits and the testimony and having considered the argument of counsel and briefs, the Court finds that the plaintiff has

established a prima facie case in race discrimination.

She has proved, number one, that she is within the protected race group. She is Black. Number two, she has proved that she is doing satisfactory work and despite her qualifications she was not selected for a promotion.

Number four she has proved that someone outside that, a white lady named Miss Geist, did receive the promotion. Thus the defendant has the obligation if it wants to of articulating a reasonable basis for not promoting the plaintiff and promoting a white person instead of her.

The defendants' articulated reason is that the plaintiff was not the best qualified candidate. Plaintiff claims that and asserts that that is a pretext, the question then really becoming whether the defendant has demonstrated in a non-

pretextual way that the plaintiff was not the best qualified candidate or equally well qualified candidate to Ms. Geist.

Plaintiff in order to prevail has to be at least equally well qualified to sustain the verdict in her favor so the question is whether the plaintiff's qualification were not as good as those of Ms. Geist or whether that argument is just a pretext.

The court has reviewed all of the evidence and the inferences that the parties suggest could be drawn from the evidence. I find that the plaintiff was rated fifth out of six interviewed for this position, this promotion; that she was rated by the computer 15th out of the 16 to be qualified to be considered, then put on the candidate list.

I find that she did not have for many years prior to this promotion

consideration in her file any letters of commendation or appreciation or awards of any kind for outstanding service. I find that she had not been promoted in place for 16 years and I find that in her grading and performance on the annual reviews during the last year or so -- there was two of them-- her grades were all medium. She was certainly not failing.

She was a competent employee, capable of doing the job she had, but she was always rated "C" grades, received no excellent grades and no outstanding grades, and therefore in comparing her as I must with Ms. Geist to determine if the plaintiff was at least equally qualified, I find that the plaintiff has failed to prove that she was equally qualified as the person selected by the procedure that was followed as a matter of formal,

established reasonable procedure, and therefore I find that the defendant has adequately established, that the defendant has adequately articulated the required reasonable business explanation for choosing Ms. Geist over the plaintiff, and that the plaintiff has failed to establish that that was pretextual.

I do not find that age was a factor that made a difference between the plaintiff's promotion and non-promotion and I cannot find any corroboration for plaintiff's statement that the defendant's supervisor, Mr. Wybenga, told her that he was prejudiced on the basis of race. To me that's incredible. I don't accept that he said that.

This is the only possible smoking gun in the case, but is completely contradicted by everybody else's

characterization of Mr. Wybenga's attitude toward people of different ages and different races of people in this aspect of the case and particularly the testimony of Olga Humphrey who I find to be a very credible witness who has no interest in the outcome of the case and whose demeanor on the witness stand was very open and direct, obviously has no ax to grind.

She is retired now as the plaintiff is, so I just believe her when she says that she never saw any signs there that their supervisor, Mr. Wybenga, was a racist and that he discriminated in his official capacity or private capacity against anybody on the basis of race.

The motion to dismiss as to race discrimination is granted and the action and complaint are dismissed with prejudice.

Court is in recess.

(Proceedings concluded at 3:30 p.m.)

****

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Court Reporter Date

FILED
AUG 3 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-841

EMMA K. ALEXANDER,

Plaintiff,

v.

JAMES F. MC GOVERN, Acting Secretary
EDWARD C. ALDRIDGE, JR., Secretary, and
DEPARTMENT OF THE AIR FORCE, AGENCY,

Defendants.

PRETRIAL ORDER

I. DATE AND APPEARANCES:

No pretrial conference was held. By agreement of the parties and the Magistrate, the Pretrial Order was prepared prior to the conference in lieu thereof.

II. JURISDICTION:

Jurisdiction exists under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e, et seq., and under the Age Discrimination in

Employment Act of 1967 as amended, 29 U.S.C. Sec. 621, et seq., and 42 U.S.C., Sec. 1343(3) and (4)k.

III. CLAIMS AND DEFENSES:

A. Plaintiff claims Plaintiff claims that she was subjected to unlawful discrimination on the basis of race or age, or both, when she was twice denied a promotion to GS-501-11, Financial Systems positions. Plaintiff had performed that duty as a GS-502-9 for a period of approximately twelve years during which the Grade 11 was received, Plaintiff was the best qualified employee in the section. She was also most experienced, the only black employee, and the oldest member of the section.

Plaintiff's department was composed of two sections: JUMPS and ARPAS. The difference in the sections was the type of work handled. The duty performances

were basically the same. In June 1984, a Grade 11 rating was authorized in the ARPAS Section. Plaintiff at the time was in JUMPS. The Defendant selected a junior employee from the JUMPS' Section, moved that employee to the ARPAS section, and promoted her. In August of 1984, a Grade 11 was authorized in the JUMPS Section. On that occasion, the Defendants moved the previously transferred employee back to JUMPS with her Grade 11. In both cases the employees promoted were white females and younger than the Plaintiff. The Defendant deliberately misused the appointment process in order to prevent Plaintiff from obtaining either of the promotions, even though the Plaintiff was the most qualified person at the time of the promotional decisions.

Because of the discriminatory treatment, Plaintiff is entitled to retroactive promotion to the Grade GS-502-11 and back pay from June of 1984 to the time of her retirement in June of 1989.

B. Defendant Claims: Defendant denies that it discriminated against Plaintiff in failing to select her for the position of GS-502-11 Financial Systems position on any basis. Defendant affirmatively states that Plaintiff has failed to mitigate her damages, Plaintiff is not entitled to a jury trial herein, and Plaintiff is not entitled to damages herein.

VI. STIPULATIONS:

1. Jurisdiction is appropriate in this court.

2. Donald B. Rice is the current Secretary of the Air Force.

3. Prior to June of 1984, the highest grade for a Financial Systems Specialist in the Testing Branch was Grade GS-501-09.

4. The Testing Branch was composed of two sections: JUMPS and ARPAS.

5. In June of 1984, a GS-502-11 Financial Systems position was authorized in the ARPAS Section of the Testing Branch.

6. In August of 1984, a GS-501-11 Financial Systems Specialist position was authorized in the JUMPS section which was the section in which Plaintiff was assigned.

7. Plaintiff was considered but not selected for the GS-501-11 position in the JUMPS Section.

Evidentiary Stipulations: The parties will stipulate concerning authenticity and admissibility of documentary

exhibits, or agree on which exhibits are contested prior to trial.

V. PENDING MOTIONS:

None.

VI. WITNESSES:

A. Plaintiff's witnesses:

The Plaintiff will call:

Plaintiff, Emma K. Alexander who will testify concerning the matters alleged in her Complaint.

Plaintiff may call:

any witness certified by the Defendant or as is necessary for impeachment, rebuttal, foundation or as otherwise necessary.

Plaintiff does not anticipate calling any expert witnesses.

B. Defendant's witnesses:

1. Non-Expert witnesses:

Defendant will call the following lay witnesses:

Erwin Wybenga
Olga Humphrey
Richard Pepe
Mary Ann Putnam
Shirley Geist

Defendant may call the following lay witnesses:

Carolyn Hill
Cheryl M. Hariuch
Michael J. Flynn

Any witness required for impeachment and/or rebuttal

Any witness required for authentication of an exhibit

Any witness listed not later than the status conference herein.

Any witness listed by Plaintiff.

2. Expert witnesses:

Defendant may call the following expert witness:

Cheryl Lepard, Personnel Expert.

Written summaries of opinions of expert witnesses and a description of expert's qualifications must be provided to opposing counsel no later than thirty (30) days after the entry of the Pretrial Order. The names of any additional witnesses must be disclosed to opposing counsel within ten days of their becoming known or their existence should have become known. In addition, a final written list of witnesses must be filed at the status conference referred to in Section XII(b).

VII. EXHIBITS:

A. Plaintiff's exhibits:

Plaintiff will introduce records relating to the selection process in both June and August 1984.

Plaintiff will introduce comparative records of herself and the selected employees.

Any records generated through discovery.

Any records from Plaintiff's EEOC file.

B. Defendant's exhibits:

1. EEO file of Plaintiff.
2. Official Personnel file of Plaintiff.
3. Administrative Record produced in EEO process.
4. All exhibits introduced at Administrative Hearing.
5. Answers to Discovery Requests.
6. Any documents produced in discovery.
7. Any document listed by Plaintiff.

8. Any documents required for impeachment and/or rebuttal.

9. Any document listed not later than the status conference herein.

The parties may identify additional exhibits no later than the status conference.

Copies of exhibits must be provided to opposing counsel no later than the status conference referred to in Section XII(b).

VIII. DISCOVERY:

The following provisions were made for discovery: Plaintiff will take the deposition of Mr. Erwin Wybenga within sixty days of entry of the pretrial order.

IX. SPECIAL ISSUES:

None.

X. OFFER OF JUDGMENT:

Counsel acknowledge familiarity with the provisions of Rule 68, Federal Rules of Civil Procedure (offer of judgment) and have discussed it with the clients against whom claims are made in this case.

XI. EFFECT OF PRETRIAL OFFER:

(a) Counsel acknowledge familiarity with the provisions of Rule 16, Federal Rules of Civil Procedure (pretrial procedure; formulating issues).

(b) Hereafter, this Order will control the subsequent course of this action and the trial and may not be amended except by consent of the parties and approved by the Court or by Order of the Court to prevent manifest injustice. The pleadings will be deemed merged herein. In the event of ambiguity in any

provision of this Order, reference may be made to the records of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

XII. TRIAL AND ESTIMATED TRIAL TIME; STATUS CONFERENCE:

(a) Plaintiff's claim under 42 U.S.C. 2000(e) will be tried to the Court. Plaintiff's claim under 29 U.S.C. 621, et seq. will be tried to the jury. It is estimated that the trial will last two days.

(b) A final trial preparation conference will be held by the Court no later than thirty (30) days before the trial date; usually this conference is scheduled the week before trial, thus minimizing duplication of preparation time. At this conference, counsel shall file final lists of all exhibits and witnesses. The Court may also consider

motions in limine, if any, on particular issues and other matters to expedite the trial. By signing this pretrial order, counsel acknowledge that they have received and read this Court's trial procedure memorandum and its check list of items on which counsel are to be prepared at the final trial preparation conference.

Dated this 2nd day of August, 1990

BY THE COURT:

Judge

Recommended by:

_____

United State Magistrate

PRETRIAL ORDER APPROVED:

TRIMBLE, TATE AND NULAN, P.C.

for Penfield W. Tate II, #4681
1660 Lincoln Street, #2802
Denver, CO 80264-2801
Telephone No. (303) 839-1572
Attorneys for Plaintiff

Paula M. Ray, No._____
Assistant U.S. Attorney
633 Seventeenth Street, Suite 1600
Denver, CO 80202
Attorneys for Defendant

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EMMA K. ALEXANDER,	)	
	)	
Plaintiff - Appellant,	)	
	)	
v.	)	No. 92-1010
	)	
DONALD B. RICE, current Secretary of the Air Force,	)	
	)	
Defendant - Appellee	)	

ORDER
Entered July 22, 1992

Before MOORE, BARRETT, BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the court
ROBERT L. HOECKER, Clerk

By:

_____
Patrick Wyman
Deputy Clerk

APPENDIX D